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No. 03-725

In the Supreme Court of the United States

DAVID B. PASQUANTINO, CARL J. PASQUANTINO, AND ARTHUR HILTS, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the wire fraud statute, 18 U.S.C. 1343, prohibits schemes to use the interstate wires in the United States to defraud a foreign government of tax revenue.

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OPINIONS BELOW

The opinion of the en banc court of appeals (Pet. App. 1a-37a) is reported at 336 F.3d 321. The opinion of the panel (Pet. App. 38a-53a) is reported at 305 F.3d 291.

JURISDICTION

The judgment of the court of appeals was entered on July 18, 2003. On September 29, 2003, Chief Justice Rehnquist extended the time within which to file a petition for a writ of certiorari to and including November 15, 2003, and the petition was filed on November 14, 2003. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the District of Maryland, petitioners David and Carl Pasquantino were convicted of six counts of wire fraud and petitioner Hilts was convicted of one count of wire fraud, all in violation of 18 U.S.C. 1343. Petitioners David and Carl Pasquantino were sentenced to 97 months of imprisonment, to be followed by two years of supervised release, and petitioner Hilts was sentenced to 21 months of imprisonment, to be followed by two years of supervised release. A panel of the court of appeals reversed petitioners' convictions. Pet. App. 39a-53a. The en banc court of appeals vacated the panel decision and affirmed petitioners' convictions and petitioner Hilts's sentence. *Id.* at 1a-37a.

1. After the Canadian government increased taxes on liquor, a lucrative "black market" developed for liquor smuggled into Canada from the United States. To take advantage of that black market, petitioners smuggled large quantities of liquor into Canada from Maryland. By doing so, they defrauded Canada and the Province of Ontario of excise duties and tax revenues owed on the importation and sale of the liquor in Canada. Pet. App. 2a.

Petitioners' scheme worked as follows : First, while in Niagara Falls, New York, petitioners David and Carl Pasquantino placed orders for the liquor over the telephone to discount liquors stores in Maryland; second, petitioner Hilts and others picked up the orders in rental trucks and drove the shipments to New York for storage; and third, a driver smuggled a quantity of the liquor across the Canadian border in the trunk of a vehicle. Pet. App. 2a-3a. Petitioner David Pasquantino

instructed his smugglers to disregard Canadian customs officials if they ordered the drivers to stop for a secondary inspection. Gov't C.A. Br. 3-4, 6-7.

The indictment charged petitioners with "devis[ing] and intend[ing] to devise a scheme and artifice to defraud the governments of Canada and the Province of Ontario of excise duties and tax revenues relating to the importation and sale of liquor." Pet. App. 58a. Each of the wire fraud counts was based on a telephone call between Niagara Falls, New York, and Maryland. *Id.* at 60a-64a. Petitioners filed a pretrial motion to dismiss the indictment on the ground that a scheme to defraud a foreign government of duties and taxes is not cognizable under the wire fraud statute. The district court denied the motion. Gov't C.A. Br. 2-3.

At trial, a Canadian customs intelligence officer testified about the various taxes that apply to liquor imported from the United States into Canada. She explained that the Canadian and provincial taxes on a case of liquor purchased in Maryland for approximately $56 and then imported into Canada would be approximately $100 per case. In general, the amount of Canadian tax due was twice the purchase price of the liquor in the United States. Pet. App. 4a; Gov't C.A. Br. 4-7.

The jury found petitioners Carl and David Pasquantino guilty on all six counts of the indictment. The district court dismissed counts two through six against petitioner Hilts before it submitted the case to the jury, and the jury found him guilty on the remaining count. Pet. App. 4a-5a.

2. A divided panel of the court of appeals reversed petitioners' convictions. Pet. App. 38a-53a. The panel first held that Canada's right to collect taxes is a property right for purposes of the wire fraud statutes. *Id.* at 43a-44a. It then held, however, that the common-

law revenue rule barred the prosecution in this case. *Id.* at 44a.

The court of appeals granted the government's motion for rehearing en banc, and the en banc court then affirmed petitioners' convictions. Pet. App. 1a-37a. The court first held that since the wire fraud statute, on its face, reaches schemes to defraud a foreign government of tax revenue, such conduct could only fall outside that statute if there were, at the time of the statute's enactment, a well established common law rule prohibiting the courts of one sovereign from recognizing the existence of the revenue laws of a foreign sovereign. *Id.*, at 6a. Based on the Restatement (Third) of Foreign Relations Law of the United States (1987), the court held that there was no such well established rule. Instead, the court held that the common law revenue rule is that "courts in the United States are not required to recognize or to enforce judgments for the collection of taxes, fines, or penalties rendered by the courts of other states." Pet. App. 6a (quoting Restatement (Third) § 483). The court emphasized that the common law rule is "permissive" rather than "mandatory," and "it pertains to the nonenforcement of foreign tax judgments as opposed to the nonrecognition of foreign revenue laws." *Id.* at 11a.

The court also rejected petitioners' argument that affirming their convictions would be the functional equivalent of enforcing the revenue rules of Canada and the Province of Ontario. Pet. App. 12a-13a. The court explained that a prosecution under the federal wire fraud statute does nothing to enforce any tax judgment or claim of a foreign sovereign. *Id.* at 13a. Instead, "such prosecution seeks only to enforce the federal wire fraud statute for the singular goal of vindicating our government's substantial interest in preventing our

nation's interstate wire communication systems from being used in furtherance of criminal fraudulent enterprises." *Ibid.* The court also concluded that petitioners' convictions do not raise separation-of-powers concerns since "Congress enacted the wire fraud statute and the United States Attorney, acting on behalf of the United States as directed by the Executive Branch, made the decision to seek the [petitioners'] indictment thereunder." *Id.* at 14a.

Like the panel, the en banc court rejected petitioners' contention that a foreign government's right to tax revenue is not a property right for purposes of the wire fraud statute. The court explained that "because a government has a property right in tax revenues when they accrue, * * * the tax revenues owed Canada and the Province of Ontario by reason of the [petitioners'] conduct in the present case constitute property for purposes of the wire fraud statute." Pet. App. 16a.

Judge Gregory, joined by Judge Michaels, dissented. Pet. App. 27a-37a. The dissent concluded that the revenue rule not only bars enforcement of a foreign government's revenue laws, but also any recognition of such laws. *Id.* at 32a-33a.

ARGUMENT

1. Petitioners contend that, in light of the common law revenue rule, the United States may not bring a wire fraud prosecution against persons who use the wires in this country to defraud a foreign government of tax revenue. That contention is without merit and does not warrant review.

The text of the wire fraud statute applies to "*any* scheme or artifice to defraud * * * by means of wire, radio or television communication in interstate or foreign commerce." 18 U.S.C. 1343 (emphasis added).

It contains no exception based on the identity of the victim of the fraud or the nature of the property that is the object of the fraud. Consistent with the terms of the wire fraud statute, courts have held that the wire fraud statute applies to schemes to defraud foreign governments, foreign corporations, and foreign individuals. See, *e.g.*, *United States* v. *Sensi*, 879 F.2d 888 (D.C. Cir. 1989) (foreign corporation owned by foreign government); *United States* v. *Van Cauwenberghe*, 827 F.2d 424 (9th Cir. 1987) (foreign individual and foreign corporation), cert. denied, 484 U.S. 1042 (1988); *United States* v. *Gilboe*, 684 F.2d 235, 237-238 (2d Cir. 1982) (foreign government), cert. denied, 459 U.S. 1201 (1983). The courts have also upheld mail and wire fraud convictions of defendants who were found to have engaged in schemes to defraud the federal government or a State of tax revenue. See, *e.g.*, *United States* v. *Goulding*, 26 F.3d 656, 663 (7th Cir.) (federal taxes), cert. denied, 513 U.S. 1061 (1994); *United States* v. *Dale*, 991 F.2d 819, 849 (D.C. Cir.) (per curiam) (federal taxes), cert. denied, 510 U.S. 906 (1993); *United States* v. *Helmsley*, 941 F.2d 71, 94 (2d Cir. 1991) (state taxes), cert. denied, 502 U.S. 1091 (1992); *United States* v. *Melvin*, 544 F.2d 767 (5th Cir.) (state taxes), cert. denied, 430 U.S. 910 (1977); *United States* v. *Brewer*, 528 F.2d 492 (4th Cir. 1975) (state taxes). Thus, by its terms, the wire fraud statute applies to schemes to defraud foreign governments of tax revenue.

Congress legislates against the backdrop of well established common law rules. Accordingly, if there were a well established common law rule barring the United States from bringing a criminal prosecution against persons who commit fraud in this country simply because the defrauded party is a foreign government and the property that is the object of the fraud is

tax revenue, the wire fraud statute might be construed to incorporate that common law rule. See *Astoria Fed. Sav. & Loan Ass'n* v. *Solimino*, 501 U.S. 104, 108 (1991) (Congress legislates with an expectation that well established common law rules will apply unless a statutory purpose to the contrary is evident). In fact, however, at the time the wire fraud statute was enacted, there was no such well established common law rule.

The revenue rule, on which petitioners rely, has a far more limited scope. Under that rule, the courts of one sovereign will not enforce the tax judgments or unadjudicated tax claims of another sovereign. See, *e.g.* *QRS 1 Aps* v. *Frandsen*, [1999] 3 All E.R. 289 (C.A. 1999); *Her Majesty the Queen in Right of the Province of British Columbia* v. *Gilbertson*, 597 F.2d 1161 (9th Cir. 1979); *Banco Do Brasil, S.A.* v. *A.C. Israel Commodity Co.*, 190 N.E.2d 235 (N.Y. 1963), cert. denied, 376 U.S. 906 (1964); *United States* v. *Harden*, [1963] S.C.R. 366 (Sup. Ct. Can.); *Peter Buchanan Ltd.* v. *McVey*, [1955] A.C. 516 (Ir. H. Ct. 1950), aff'd, [1955] A.C. 530 (Ir. S. C. 1951). That rule is not implicated when the United States brings a criminal prosecution to enforce the wire fraud statute. As the Fourth Circuit explained, in such a prosecution, the United States does not seek to collect tax revenue for the foreign government. Pet. App. 13a. Instead, it acts to vindicate the United States' sovereign interest in preventing persons from using the wires in this country to commit fraud. *Id.* at 13a-14a.

Nor does a wire fraud prosecution implicate the separation-of-powers considerations that underlie the revenue rule—that courts are ill-equipped to decide when foreign governments should be permitted to enforce their revenue laws in this country and that such judgments are more appropriately made by the legis-

lative and executive branches of the government. As the Fourth Circuit explained, a federal wire fraud prosecution is brought by the Executive Branch pursuant to legislative authorization, and a prosecution will be brought only when the Executive Branch decides that it is in the interest of the United States to do so. Pet. App. 14a. The court of appeals therefore correctly held that the revenue rule did not bar the criminal prosecution in this case.

2. Only two other circuits have addressed the question presented in this case. Consistent with the decision in this case, the Second Circuit held in *United States* v. *Trapilo*, 130 F.3d 547 (1997), cert. denied, 525 U.S. 812 (1998), that the wire fraud statute "reaches *any* scheme to defraud * * * whether the scheme seeks to undermine a sovereign's right to impose taxes or involves foreign victims and governments." *Id.* at 552. The court squarely rejected the view that the common law revenue rule precludes such a prosecution. *Id.* at 552-553. In contrast, the First Circuit held in *United States* v. *Boots*, 80 F.3d 580, cert. denied, 519 U.S. 905 (1996), that the revenue rule bars a criminal prosecution for wire fraud when the object of the fraudulent scheme is to deprive a foreign government of tax revenue.

The First Circuit's conflicting decision in *Boots* does not provide a basis for granting review in this case for three reasons. First, the decision in *Boots* is clearly incorrect. Other than the decision in that case, there is no support for the view that the common law revenue rule ever barred a country from enforcing its own criminal laws simply because the object of the crime was to deprive a foreign government of tax revenue. Second, the First Circuit decided *Boots* before the Second Circuit reached a different conclusion in *Trapilo*

and the Fourth Circuit reached a different conclusion in this case. It is entirely possible that, if presented with the question again, the First Circuit would be prepared to reevaluate *Boots* in light of those two decisions. Third, the question presented has arisen infrequently. It does not have sufficient recurring importance at this time to warrant this Court's review.

3. The other decisions cited by petitioners do not conflict with the decision below and therefore provide no basis for review. In *United States* v. *Pierce*, 224 F.3d 158 (2000), the Second Circuit affirmed its prior holding in *Trapilo* that the government may prosecute a scheme to deprive a foreign government of tax revenue without implicating the revenue rule. It reversed the convictions in *Pierce* solely on the factual ground that the government had not sufficiently proved that Canada imposed any duty on imported liquor. *Id.* at 165-168.

The other two decisions cited by petitioners address the entirely different question whether a foreign government may bring a civil action to recover lost tax revenue when the claim is based in part on a United States law. In *Attorney General of Canada* v. *R. J. Reynolds Tobacco Holdings, Inc.*, 268 F.3d 103 (2d Cir. 2001), cert. denied, 537 U.S. 1000 (2002), the Attorney General of Canada filed suit against several tobacco companies for engaging in a scheme to smuggle cigarettes across the United States-Canadian border in order to avoid the payment of Canadian taxes, in violation of the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. 1961 *et seq.* The court of appeals held that because Canada sought through its RICO claim to have a United States court require the defendants to reimburse Canada for its unpaid taxes, the revenue rule precluded that claim. 268 F.3d at 131.

Nothing in that decision calls into question the Second Circuit's prior holding in *Trapilo* that the revenue rule does not bar a criminal prosecution where the object of the criminal conduct is to deprive a foreign government of tax revenue. To the contrary, the Second Circuit reaffirmed its prior decision in *Trapilo* on the ground that there is a "critical difference" between a civil suit brought by a foreign sovereign and a criminal action brought by the United States. 268 F.3d at 123. The court explained that, because criminal prosecutions are brought to serve the interests of the United States, and are subject to Executive Branch oversight, "the foreign relations interests of the United States may be accommodated throughout the litigation." *Ibid.* "In contrast," the court observed, "a civil RICO case brought to recover tax revenues by a foreign sovereign to further its own interests, may be, but is not necessarily, consistent with the policies and interests of the United States." *Ibid.*

For the same reason, the Eleventh Circuit's decision in *Republic of Honduras* v. *Philip Morris Companies, Inc.*, 341 F.3d 1253 (2003), petition for cert. pending, No. 03-686, has no bearing on the question presented in this case. In that case, foreign sovereigns filed civil RICO actions against tobacco companies seeking the recovery of tax revenues. Adopting the reasoning of *Attorney General of Canada*, the Eleventh Circuit held that the revenue rule barred those suits. 341 F.3d at 1257. Because *Republic of Honduras* addressed only the application of the revenue rule to civil actions by a foreign sovereign, that decision is inapposite here.

Petitioners contend (Pet. 27-28) that the Fourth Circuit in this case necessarily implied that the revenue rule would not bar a civil action by a foreign government under RICO to collect tax revenue, and the

decision therefore conflicts with the Second Circuit's decision in *Attorney General of Canada* and the Eleventh Circuit's decision in *Republic of Honduras*. But the Fourth Circuit addressed only the question before it. It did not address the question whether a foreign government could file suit under RICO in order to collect tax revenue. Petitioners' view on how the Fourth Circuit would rule in a civil case is only speculation. Nor is that speculation well grounded. The Fourth Circuit concluded that the revenue rule did not bar the prosecution in this case because that prosecution "does nothing civilly or criminally to enforce any tax judgements or claims that the foreign sovereign has or may later obtain against the defendant." Pet. App. 13a. That reasoning makes clear that the Fourth Circuit may take a different view of a civil RICO claim brought by the foreign sovereign itself to reclaim its lost revenue.

4. Petitioners' remaining contentions are all without merit. Petitioners err in contending (Pet. 10-11, 14 n.15) that tax revenues are not property for purposes of the wire fraud statutes. As the Fourth Circuit explained, because a government has a property right in tax revenues when they accrue, the tax revenues owed Canada and the Province of Ontario constitute property for purposes of the wire fraud statute. Petitioners' reliance on *Cleveland* v. *United States*, 531 U.S. 12 (2000), to support a contrary conclusion is misplaced. In *Cleveland*, the Court held that the mail fraud statute does not reach fraud in obtaining a video poker license, because the license at issue was not "property" of the State, the victim of the alleged fraud scheme. *Cleveland* has no application here. Indeed, the Court in *Cleveland* specifically distinguished the situation in that case from one where the government alleges that a

defendant has defrauded a government of "money to which the State was entitled." *Id.* at 22. That is precisely the allegation that the United States made here.

Petitioners similarly err in contending (Pet. 21-22) that the existence of the smuggling statute, 18 U.S.C. 546, precludes prosecution under the wire fraud statute. When conduct violates more than one statute, the government may proceed under either. See, *e.g.*, *United States* v. *Oldfield*, 859 F.2d 392, 397-399 (6th Cir. 1988) (it was permissible for government to prosecute defendant for mail fraud rather than misdemeanor offense of odometer tampering); *United States* v. *Edmonson*, 792 F.2d 1492, 1498 (9th Cir.) ("The fact that there are two criminal statutes applying to exactly the same criminal conduct, and one provides a different penalty from the other, does not create 'irreconcilable conflict' to support a claim of implied repeal.") (internal citations omitted)), cert. denied, 479 U.S. 1037 (1986).

Finally, petitioners argue (Pet. 24) that there was insufficient evidence that the liquor imported into Canada and the Province of Ontario was subject to tax at the time of their offense. As the court of appeals explained, however, the government offered sufficient evidence on that issue. Pet. App. 19a. In any event, petitioners' fact-bound challenge to the court of appeals' determination does not warrant review

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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